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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 198.

ARTHUR J. KARNUTH, United States Director of Immigration, and CHARLES DREHER, Inspector in Charge United States Immigration Service, *Petitioners,*

v.

UNITED STATES OF AMERICA, on the Petition of PRESTON M. ALBRO, an Attorney, for Mary Cook and Antonio Danelon.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Statement.

The questions of fact are not disputed. The relators are both British Subjects, residents of Canada, Danelon being a naturalized Canadian, and Mary Cook being a subject of Great Britain through birth in Scotland.

The Circuit Court held that the respondents were "non-immigrants" under Section 3 of the Immigration Act of 1924 (now Sec. 203, 8 U. S. C. A.), and that in entering the United States to perform labor for hire, but maintaining their residence in the Dominion of Canada, they came within the Exception (2) thereof. The Court further held that they had the right to enter the United States temporarily for business purposes and they could not be excluded at the border under General Order 86, effective December 1st, 1927, which the Court below ruled was without authority of law. The Circuit Court also held that Article III of the Jay Treaty was still in force and effect and that the relators, as British Subjects, were entitled thereunder to pass and repass the border for the purpose of seeking or engaging in employment, but maintaining their residence in Canada.

Summary of Argument.

Before proceeding with the formal argument on the two main questions of law involved in this case, we respectfully desire to call to the Court's attention what we believe to be essentially the true meaning and purport of the Immigration Acts. We think it is essentially accurate to state that the Immigration Acts do not and were not intended to exclude *any mentally, morally and physically sound person*, with the exception of Asiatics, from **entering** this country and the whole purport and intent of all the present Immigration Acts was **to limit the number of aliens seeking to enter this country for the purpose of obtaining a residence or domicile.** There may be certain exceptions to this general statement, but, fundamentally, this is true, and, if the Court, in construing the provisions of the Immigration Act, considers it not as designed to bar

people from this country but only designed to bar certain numbers of persons from obtaining permanent residence in this country (and also, of course, those unfit to temporarily or permanently mingle with our peoples), we believe a decision reached by the Court in that light will more conform to the spirit of the law. The attitude of those administering the Immigration Acts, we submit with all respect, is that all persons entering this country for any purpose, temporarily or permanently, are to be kept from the country by the provisions of the Act, if possible, particularly in the case at bar, where, as appears from the petition for certiorari presented by the Government, the exclusion of persons of the class of the relators herein was done at the instigation of the Labor Unions. It seems unfortunate that the administration of the Immigration Act is under the direction of the Secretary of Labor, an official who is primarily appointed to represent the interests of a particular class of people.

Argument.

(Although the brief of the Government considers first the effect of the Jay Treaty of 1794, we feel that the order of treatment of the questions in the case by the Circuit Court was the logical one, and, therefore, present those two questions in that sequence. Unless specially noted Italics in references to statutes, decisions and citations are ours.)

POINT I.

General Order Number 86 Is Invalid and Void as In Contravention of the Immigration Acts.

For the convenience of the Court, we quote again that order, so far as material here:

"1691

U. S. Department of Labor
BUREAU OF IMMIGRATION
Washington

No. 55479/537
55266/General April 1, 1927.

GENERAL ORDER No. 86

SUBJECT: Land border crossing procedure.

1. ***Hereafter*** aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country *will not be considered as visiting the United States temporarily for business or pleasure*, under any provisions of the Immigration Law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the '*immigrant*' class.

2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border crossing privilege may continue so to enjoy it upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission, and, provided further, that they are not coming to seek employment."

The exceptions following do not in any way affect the two aliens in behalf of whom this writ was issued.

In substance, this rule requires British subjects, crossing daily for work, to obtain consular immigration visas and classifies such persons as "immigrants," where heretofore, up to the present time, such persons have been classified as "non-immigrants".

Such authority as rests in the Department of Labor at the present time to make any such regulations is contained in Section 102, 8 U. S. C. A., the material part of which reads as follows:

"The Commissioner General of Immigration under the direction of the Secretary of Labor shall have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction and supervision of all officers, clerks, and employees appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries and other papers and shall issue from time to time such instructions *not inconsistent with law*, as he shall deem best calculated for carrying out the provisions of this section and sections."

As to the power to make regulations, we refer the Court to The Parthian, C. C. A. N. Y., 1921, 276 Federal, 903, from which we quote head note 3:

"While the Commissioner may make regulations to enforce the Immigration Act, it was not permissible for the department to make or proclaim regulations which were beyond the powers delegated by the Congress to the Commissioner, by Section 23 of the Immigration Act (Section 959)."

We also call the Court's attention to the case of *Merkle, et al., v. Paschkes*, 123 Misc. N. Y. 203; 204 N. Y. Supp. 102, which holds in substance, and we quote from the head note:

"The Commissioner General of Immigration exceeded his powers under Immigration Law, Section 23, in formulating the rule that no attorney shall demand or receive compensation exceeding $25 for appearing in behalf of the United States, or of an alien, or aliens constituting one family applying for admission unless authorized to do so by the department or officer in charge of the immigration station; hence the rule is invalid as being legislation."

The broad principle is enunciated that a legislative body may not delegate its powers but may authorize an executive officer to adopt reasonable rules to carry out legislation which *it* has enacted.

Is it not legislation as in contradistinction to a departmental rule to classify as an "immigrant" one whom Congress has classified as a "non-immigrant" clearly and emphatically?

It is true that the authority given by Section 24 of the Immigration Act of 1924 to pass regulations omits the words "*not inconsistent with law.*" This insertion is, of course, not necessary in any event, but the later sections of the Act of 1924 state that such act is to be construed as supplemental to the Act of 1917.

It is our contention that this regulation, promulgated pursuant to said section is beyond the powers of the Commissioner General of Immigration, acting under the Secretary of Labor, in that it contravenes the purpose and intent of Section 203 (8 U. S. C. A.) and is beyond the powers delegated by Congress. Not only that, but as we shall show later, in effect it attempts to nullify Article 3 of the Jay Treaty of 1794, between Great Britain and the United States, which we believe has never been abrogated.

Section 203, (8 U. S. C. A.) reads as follows:

> "'IMMIGRANT' defined. When used in this Chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

The question is then presented as to whether or not an alien desiring to cross daily for employment is an "immigrant", as contended by the Petitioners or a "non-immigrant", as contended by us. If, as we contend, the Respondents are not immigrants, then they were entitled to

their discharge because they were held upon a "conclusion of law" which cannot be supported upon the evidence adduced at the hearing.

It is our contention that the aliens at bar are entering the United States "temporarily for business."

The Petitioners maintain that "business" does not include the ordinary vocations of man, but includes only trading and merchandising. *With this contention we are at odds.* We refer to the Court the definition of "business" in *Corpus Juris*, and other text books, and cases cited thereunder. We quote from *Corpus Juris*, Volume 9, under heading "BUSINESS":

> "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit; that in which one engages for the purpose of livelihood, profit, or the like; that which occupies the time, attention and labor of men for the purpose of profit or improvement; that employment which occupies the time, attention and labor; employment, etc., etc."

and we refer to the cases cited in the foot notes thereunder.

The word "business", in its *present sense*, embraces everything about which one can be employed, and, in *its narrower sense*, it signifies *a calling for the purpose of livelihood or profit.* See Easterbrook v. Hebrew Ladies Orphan Society, 82 Atl. 561, 563; 85 Conn. 289; 41 L. R. A. (N. S.) 615.

Business, "a very comprehensive term which embraces everything about which a person can be employed"; again "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit, but it is not necessary that it should be the sole occupation or employment."

It embraces everything about which a person can be employed, *Flint v. Stone Tracy Co.*, 220 U. S. Rep. 107, 111.

See also *re* above

People v. Commrs. of Taxes of New York, pages 242, 244, 23 N. Y. Rep. and the case of,

The Parker Mills v. Commrs. of Taxes, 23 N. Y. 244.

Also

Brown v. German-American Title & Trust Company, 34 Atl. 335, 343; 174 Pa. 443.

(ALL ABOVE CASES GIVE SIMILAR DEFINITIONS OF WORD.)

Business means, occupation or employment, see

Olson v. Ostby, 178 Illinois App. 176.

"The employment which occupies the time, attention and labour."

(See

Adam v. Musson, 37 Illinois App. 503.)

"Business is a word of large signification and denotes the employment or occupation in which a person is engaged to procure a living."

See

Goddard v. Chaffee, 84 Mass. (2 Allen), 395, 79 Amer. Dec. 796.

"The word BUSINESS is of large significance and denotes the employment or occupation in which a person is engaged to procure a living."

See

Allen v. Commonwealth, 78 N. E. 287, 288;—188 Mass. 59, 69 L. R. A., 599 (quoting and adopting the definition in the case of

Goddard v. Chaffee, 84 Mass (2 Allen), 395, 79 Amer. Dec. 796.)

The decisions of the Courts of England are to the same effect, and are in line with the United States cases.

See the case of *Smith v. Anderson*, (1880), 15 Chancery Division, 258, where Sir George Jessel, Master of the Rolls, said:

> "*Business* itself is a word of large and indefinite import; it is a word of extensive use and indefinite signification; anything which occupies the time and attention and labour of a man for the purpose of profit is business; the legislature could not well have used a larger word."

We respectfully submit that upon these definitions it must be held that an alien who enters in the morning to follow his vocation and returns in the evening has made a *temporary entry* within the meaning of the statute, for the purpose of business.

If the Court, notwithstanding these definitions considers the definition of "business" by Congress ambiguous, then the definition given in the statute fails and the Court should, we submit, construe the term "immigrant" according to the most obvious import of the language used. We do not believe that it will be necessary for the Court to go so far as to construe the term "immigrant," but if it should find it necessary, we respectfully submit the following:

From Corpus Juris, volume 2, under "Aliens," definition:

> "Immigration is the removing into one place from another; the act of immigrating; the entering into a country with the intention of residing in it, etc.
>
> "Immigrant is a person who removes to a country for the purpose of permanent residence."

From Webster's New International Dictionary of 1926:

> "One that immigrates; one that comes to a country for the purpose of permanent residence; to settle."

From Funk & Wagnall's New Standard Dictionary of the English Language, 1923:

"One who or that which immigrates; a foreigner who enters a country to settle there; one who removes from one place to another."

FROM CHAMBERS' TWENTIETH CENTURY DICTIONARY:

"to migrate or remove into a country; one who immigrates."

The Courts have construed the meaning of "immigrant" on many occasions.

One of the leading cases is *Moffit v. United States*, 128 Federal, 375, page 380. We quote from this case:

"'Immigrate' means to move into a country for the purpose of permanent residence. An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence, but aliens composing the crew of a vessel visiting our seaports are in no sense immigrants.

"'Immigration' is the passing or removing into a country for the purpose of permanent residence. The legislation contained in the various statutes that have been passed, relating to immigration, is clearly directed against the immigration into this country of certain classes of persons who come in with the intent of entering into and becoming a part of the mass of its citizens or population."

The reason that the immigration officials are holding these aliens to be "immigrants" is solely the fact that the Secretary of Labor in conjunction with the Commissioner General of Immigration promulgated the General Order 86, above referred to. That is, in accordance with the Order, these aliens are not to be considered as "visiting the United States temporarily as tourists" or "temporarily for business."

If an immigrant is a person who desires to change his domicile, then the aliens in whose behalf this writ is ob-

tained *are not* "immigrants." ***Can it be assumed that Congress in defining the word "Immigrant" intended to do violence to the accepted meaning of the word and the obvious import of the language used? We think not.*** It is self-evident that an administrative official cannot by his own act change the definition of Congress. (We call attention again to the fact that the definition of "immigrant" in Section 203 is in substance—one who comes from without the United States to the United States *except* temporarily for business.) That aliens of this class are not immigrants was decided adversely to the Government in this District Court thirty-six years ago in the case of *U. S. v. Michigan Central R. R. Co.*, 48 Fed. 365, when the Government attempted to fine the Michigan Central Railroad Co. for bringing a telegraph operator into Niagara Falls, N. Y., from Canada, to work for the company at Niagara Falls. This case was a proceeding by the United States to recover a penalty from the Michigan Central R. R. Co. for alleged violation of the Contract Labor Law, based upon the fact that the railroad, at its Niagara Falls, N. Y., office employed a telegraph operator who resided in Canada, and that it had full knowledge of the fact that he did so reside.

The Contract Labor Law then, as now, prohibited the *immigration* into the United States of laborers under contract. There was no question that the employee, Mr. Blaut, resided in Canada and came to the United States to work. The question was whether the railroad had induced him to "*migrate*" to the United States under contract of employment. On this issue, the court said *verbatim:*

> "*Mr. Blaut was not an immigrant because* **he did not come here intending to acquire a permanent or a temporary home.**"

This is the condition under which the **commuters** on the Canadian border enter the United States; they return in the evening to their homes in Canada. It follows that the immigration authorities not only are wrong when they attempt *to classify* such people as "immigrants" but they are acting contrary to the decision of the Courts which decided the question adversely to them thirty-six years ago.

It seems to follow that General Order 86, which raises the same condition, should be dealt with in the same way as the complaint against the Michigan Central. The aliens in this case are "non-immigrants" under the Statute, and cannot be made "immigrants" merely by *departmental order*, contrary to the intent of the Act of Congress. It follows that the writ should be sustained on this point alone.

The exceptions stated in Rule 86, which Counsel for the Government contends ameliorates its apparent harshness, soften it in no way in the particular case of either of these Respondents, as they do not come within the exceptions.

The District Court referred on the argument herein to the question of the rule itself having provided an opportunity of six months for British subjects intending to *immigrate* into this country to secure the Consular Vise. This is true. When it was seen on or about November 28th that a great hardship was to be worked upon many British subjects whose Waiting List number did not entitle them to enter into the United States, an order was issued allowing them to cross pending the reaching of their number on the Quota List (this, as a matter of fact, retards others who are waiting) *but* it, in no way, applies to British subjects in Canada who do not desire to *immigrate*, but only desire the border crossing privilege to and fro. The Consular Vise and

numerical limitation was never intended for the purpose of mere border crossing, and statements are required showing **an intention to change domicile.** Thus, those British subjects who have not a bona fide intention of a dwelling in the United States must either falsify or be deprived of the border-crossing privilege.

Bluntly put, General Order 86 classifies as an "immigrant" a person who under Section 203 8 U. S. C. A. was specifically made a "non-immigrant." This, we respectfully submit is, "inconsistent with the law" as provided in Section 102, and, in addition, has the momentous effect of violating a solemn treaty between Great Britain and the United States.

We have examined the Immigration Act with care, and we can find no word which indicates an intent on the part of Congress to override the provisions of any existing treaty with Great Britain. Unless there is such a clear intent found in the statutes, or even if there is doubt on that subject, then all the provisions of the Jay Treaty may be brought before the Court as pertinent to this issue.

POINT II.

The Treaty between Great Britain and the United States, known as the Jay Treaty of 1794, prevents the exclusion of the Respondents.

The Relators herein claim the right of free, temporary passage across the Canadian border under Article III of the Treaty of Amity, Commerce and Navigation of 1794, commonly called the Jay Treaty, and the additional, "Ex-

planatory Article" of 1796, the pertinent portion of which reads as follows:

> "It is agreed that *it shall at all times be free* to His Majesty's subjects, and to citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, *freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other.*"

Attention is called to the words—"it shall at all times be free," in contradistinction to word "freely" in later part of the clause.

By Article 28 of the Treaty of 1794, it was provided that the **first ten articles of the Treaty were to be permanent.** See Article 28, first line, which says: "It is agreed that the first ten (10) articles of this treaty **shall be permanent.**" The other articles all expired by their own time limitation. (See Moore Digest of International Law, Vol. 5, page 372.)

(For Jay Treaty of 1794, *see Volume One* (1), *of "Treaties, Conventions, Agreements,"* 1776 *to* 1909, *by William M. Malloy, of the State Department at Washington, at pages* 590 *to* 606, *and pages* 607 *to* 609, *for the additional "Explanatory Article" of* 1796.)

Treaties and Acts of Congress—A Grouping of Authorities Governing Construction and Reconciliation of Both.

At this point we respectfully submit that if this Court should be in doubt as to whether or not the Immigration

Act shows any intent to nullify, or is in any way inconsistent with the Jay Treaty, may we respectfully submit the following authorities governing the general question under what conditions an Act of Congress supersedes a previous treaty.

(See also Sec. 224, 8 U. S. C. A. *post.)*

A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.

The Cherokee Tobacco Case, 11 Wallace 616, at page 621.

It is not sufficient to urge against an Act of Congress that it conflicts with or violates a prior treaty. A treaty has no superior sanctity over an Act of Congress. (Head Money Cases, 112 U. S. 580.) It is true that Courts will be slow to assume that Congress intends to violate a treaty right. *(United States v. Mrs. Gue Lim*, 176 U. S. 459; *Chew Heong v. United States*, 112 U. S. 536); but in case of an *irreconcilable conflict* between an Act of Congress and a Treaty the last in date will prevail.

Hijo v. U. S., 194 U. S. 315, at page 324.

A Treaty is of equal force with Acts of Congress; *Ex. P. Scherer*, 195 Fed. 334.

Treaties the Supreme Law of the United States; see *U. S. v. Rauscher*, 119 U. S. 407; *Court v. Hawes*, 113 Bush. 697; *Blanchford v. State*, 10 Tax App. 627.

Treaties and Acts of Congress stand on an equal footing as the Supreme Law of the land: *General Electric Company v. Robertson*, cited in 21 Fed. (2nd) 214, 215.

If clear and explicit, an Act of Congress must be upheld by the courts even in contravention of express stipulations in an earlier treaty.

Fong Yue Ting v. United States, 149 U. S. 698, at page 720.

This, we believe, is the leading case on this particular phase of the subject, and would be cited by the Government if the Government's Counsel could show any intent upon the part of Congress by the Immigration Act to *abrogate* this treaty, or this were a question of immigration. (We do not refer to Rule 86, which is not an Act of Congress.)

In that case it was stated, in the course of the opinion by Mr. Justice Gray:

> "In our jurisprudence it is well settled that the provisions of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, *if clear and explicit*, must be upheld by the Courts, even in contravention of express stipulations in an earlier treaty."

The Court will recall that this case dealt with the broad question of Chinese exclusion and the provisions of a previous treaty with China, and specifically with the registration of Chinese residents in this country. The burden was thrust upon the United States Supreme Court of sustaining the validity of an Act of Congress which the Chinese said was contrary to the provisions of a pervious treaty with China. Since the ratification of that treaty, in certain states, the importation of Chinese labor had caused conditions to arise detrimental to the interests of the citizens of the States and of the United States. These aliens failed to conform to the customs of our country and the whole problem was one

of the ability of the two races to live congenially together in the same localities. It involved the question of *permanent domicile* within the United States. The Act of Congress in question did clearly show an intent to abrogate the provisions of a previous treaty, and was held to do so. In this case we have no such question of social welfare to our inhabitants, for we are dealing with temporary entrance and exit from the country of our friends in Canada, and not with the problem of the permanent immigration of a foreign race who cannot for ages adapt itself to our life and customs, or we to theirs.

We further respectfully submit that repeals by *implication* are not favored, as shown in the case of *Johnson v. Browne*, 205 U. S. 309, at page 321, and Acts of Congress *are always to be construed so as to conform to the provisions of a treaty if it is possible to do so.*

United States v. Whiskey, 108 U. S. 491, at page 496.

Rights granted under a treaty will be held to be in force unless clearly annulled by an Act of Congress.

Cheung Sum Shee v. Nagle, 45 Sup. Ct. 539.

"The Immigration Act (8 U. S. C. A.), and Prussian Treaty of May 1st, 1828 (8 Stat. 378), should, if possible, be construed so that both can stand together and be given effect." *Hempel v. Weedin*, 23 Fed. Rep. (2nd) March 22nd, 1928, page 949, citing the *New Haven* case at page 955.

See also to same effect the case of *Powers v. Comly*, 101 U. S. Rep. 101.

Any possible theory by which both can be in force must be adopted, if a reasonable construction can be given to both.

Ward v. Race Horse, 163 U. S. 504.

In the case of *Whitney v. Robertson* (1888) 124 U. S. 190, at page 194, Mr. Justice Field said:

> "When the two relate to the same subject, the Courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."

The quota act must be construed with the view of preserving treaty rights of aliens, unless they are clearly annulled. They are aliens entitled **to enter** in pursuance of a treaty.

> *Cheung Sum Shee v. Nagle* (Cal.) 1925, 45 S. Ct. 539; 268 U. S. 336, 69 L. Ed. 985.

And in the case of the *United States v. Schooner Peggy* (1801), 1 Cranch, U. S. 103, 109, Chief Justice Marshall, pronouncing the decision of the Court, said:

> **"The Constitution of the United States declares a treaty to be the Supreme Law of the land. Of consequence, its obligation on the Courts of the United States must be admitted."**
>
> **"Where a treaty is the law of the land, and as such affects the rights of the parties litigating in Court, that treaty as much binds those rights, and is as much to be regarded by the Court as an Act of Congress."**

A Treaty is the law of the United States of which all courts, State and National, are to take judicial notice; *U. S. v. Rauscher*, 119 U. S. 407, 425.

The construction of a Treaty is for the courts, which are not bound by the construction of the executive or diplomatic branches of government; *Ex. P. Charlton*, 185 Fed. 880; aff. 229 U. S. 447, 449, 33 S. 945; (1912). *U. S. v. Greene*, 146 Fed. 766.

On this question of revocation, or rather, paralyzation of treaty rights by subsequent Congressional action it is interesting to read the opinion of the District Court for the Eastern District of Michigan, Southern Division, in the case of *Hiram Walker & Sons, Ltd. v. Lawson, Collector of Customs and Internal Revenue*, 275 Fed. 373. Therein Walker & Sons, Ltd., made an attempt to ship carloads of intoxicating beverages through United States territory under bond, and the two defendants attempted to prohibit them from doing so under the provisions of the Volstead Act. The claim was made that the Volstead Act prohibited such shipment. The Court states, at pages 376 and 377, verbatim:

> "It is another established and recognized principle of statutory construction that repeals by implication are not favored, and that a later statute will not be held to have impliedly repealed an earlier one, unless full effect cannot be reasonably given to both. *United States v. Lee Yen Tai*, 185 U. S. 213, etc.
>
> "It is equally well settled that a treaty between the United States and a foreign country will not be regarded as abrogated, and rights thereby created taken away, by a subsequent statute, by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute, it being presumed, until the contrary is plainly manifest, that Congress intends no interference with such treaty rights; and it is only where the provisions of a treaty and the terms of a later statute are in irreconcilable conflict, and can not both remain in force, that the former will be considered as impliedly repealed by the latter. *Chew Heong v. United States*, 112 U. S. 536, etc."

There is no Conflict Between the Jay Treaty and the Immigration Act.

The right of Canadian citizens to pass and repass in the manner *allowed by the Jay Treaty*, and in which these

It is true that certain clauses of the treaty expired by their own limitations, but the first ten, it appears, were made permanent by a provision in Clause 28. (See Malloy, "Treaties and Conventions," Vol. 1, above referred to, and the note on page 580 thereof, at bottom of page, citing the foregoing New Haven case as the leading authority as to the effect of the War of 1812 on Treaties of United States with Great Britain and note at bottom of page 590.)

Bearing on this question, it is worthy of more than passing notice to remember that the United States Government has acquiesced in the crossing and recrossing border privileges, and they have been acted upon and in operation with the full knowledge of the United States Authorities, without objection, ever since the year 1794, and down to and including December 1st, 1927, or for a period of one hundred and thirty-three years. The United States Government has thus recognized the existence of that treaty and of the rights and privileges granted thereunder to all British subjects, and to citizens of the United States.

We also wish to point out that the Solicitor-General of the United States, in his petition and supporting brief for a writ of certiorari herein, on appeal to the Supreme Court of the United States, filed in June, 1928, referring to the Immigration Act of 1924, admits, on pages 9, 11 and 12, that:

> **"For nearly three years after that Act was passed, aliens residing in Canada were allowed to cross daily to work, on the theory that they were not immigrants. It must be admitted that the decision below has much to support it, and the fact that the Department of Labor so construed the Act of 1924 from its passage until April 1st, 1927, is not to be overlooked."**

(In his brief, page 16, the Solicitor General now states that the above quoted is erroneous. If the Court will refer to Paragraph 3 of General Order 86, set forth on page 60 of his brief, it will no doubt see that the original statement was correct, because otherwise there would be no occasion to refer to persons admitted to Border crossing privileges "since June 30th, 1924," nor would there have been a necessity to begin General Order 86 with the ominous word "HEREAFTER.")

We also respectfully submit that the *burden in this case is upon the Government to show that there was an intention by the passage of the Immigration Act to abrogate Article III of the Jay Treaty*, if our contention in regard to the mere suspension thereof during the War of 1812 is sound.

At about the same time as the decision in the New Haven case and in the year 1830 there arose in England the case of *Sutton v. Sutton*, Volume 1 Russell and Mylne Reports, page 675, where the Master of the Rolls, Mr. Justice Leach of the Court of Chancery, decided that the treaty of 1794 was still in full force and effect, and that the War of 1812 did not end or abrogate the treaty. He cites the New Haven case and says:

> "The relations which had subsisted between Great Britain and America, when they formed one Empire, led to the introduction of the ninth section of the Treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should not depend upon the continuance of a state of peace."

(Same case also cited by Professor J. B. Moore in his International Law Digest, Vol. 5, paragraph 779, pages 373, 374.)

In an official publication of the United States Government, known as the Treaties and Conventions between Great Britain and the United States 1776 to 1887, issued under the authority of the Forty-eighth Congress, second session, at page 1228, it is stated that treaties do not, *ipso facto*, become extinguished by war, and it refers to the New Haven case above mentioned as authority. Professor Wheaton, a leading American authority on International Law, and a former Minister to foreign countries for the United States Government, says the same thing.

Professor Woolsey, International Law, 6th Edition (1897), 263, agrees that the treaty was not abrogated, and Hon. John Bassett Moore, an outstanding authority on International Law, says that Article 9 was not annulled by the War of 1812, and is one of the permanent clauses of the Jay Treaty. Moore says, Vol. 5, 382, 383:

> "It may be affirmed that the proposition that all treaties are extinguished or annulled by war is unsupported by authority at the present time."

See Volume 5 Moore's Digest of International Law (1906) pages 372, 376 to 380, 382, and his Article in Volume One of the Columbia Law Review at page 213, regarding the effect of war on treaties. In Volume 5 he said that the Jay Treaty, Article 10, also operated during the War of 1812, and survived that war. See also Chancellor Kent's Commentaries on International Law, which supports Judge Moore. Kent says (Abdys edition), pages 393 and 394:

> "The tenth (10th) article of the treaty between the United States and Great Britain, in 1794, may be

mentioned as an instance of a stipulation made for war. It provided, that debts due from individuals of the one nation to those of the other, and the shares or moneys which they might have in the public funds, or in public or private banks, should never, in any event of war, be sequestered or confiscated. *There can be no doubt that the obligation of that article was not impaired by the War of 1812, but remained throughout that war,* and continued binding upon two nations, until they should mutually agree to rescind the article; for it is a principle of universal jurisprudence, that a compact cannot be rescinded by one party only, if the other party does not consent to rescind it, and does no act to destroy it."

We fully endorse the further quotation from Kent's Commentaries on International Law, cited by the petitioners on page 31 of their brief. Clearly, the author in the earlier part of the passage quoted was referring to the status of treaty provisions between two Nations during the existence of actual hostilities, while the latter part of the quotation deals with the question of *revival* of Treaty Obligations after a declaration of Peace. This is exactly our contention, that while Article III of the Jay Treaty was suspended during the War of 1812, it being in the nature of a *permanent* arrangement consistent with lasting friendship between two neighboring nations, immediately was revived *without any specific declaration to that effect.* Particularly is this true in view of the unmistakable intention that this Article should be permanent, as evidenced by the supplemental agreement of 1796.

In this respect, it would seem that the Government Brief has not distinguished properly between the suspension of the Treaty during the period of hostilities and the revival of the permanent Treaty Obligations upon the resumption of peace. On page 43 of the Government's Brief,

a quotation is made from the argument of counsel in the case of Sutton v. Sutton, 1 Russell & Milne's Reports, 663, in which he stated:

> "It was said before the Master, that the first ten articles of the treaty were to be 'permanent,' which was construed as synonymous with 'perpetual'; but that is a construction which the twenty-eighth article does not admit of. The very first article is, 'that there should be a firm and universal peace between *Great Britain* and the United States'; that is the first of the articles supposed to be ever-enduring. Yet, what became of it in 1813? There are many of the stipulations of the first ten articles, which could not possibly be observed in a state of war. The word 'permanent' is used, not as synonymous with 'perpetual or everlasting,' but in opposition to a period of duration expressly limited. The greater number of the articles of the treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time; they were to continue so long as a treaty of peace was in force; but when war took the place of peace, and the treaty had no longer any existence, the ninth article could not continue in operation."

With respect to Article I of the Jay Treaty providing:

> "That there should be a firm and universal peace between Great Britain and the United States,"

we respectfully submit that **Article I, including that provision, was immediately revived at the expiration of the War of 1812, and has been recognized as in full force and effect continuously since that date to the present time,** and is a strong example of the character of the provisions of a treaty which are presumed to be revived immediately following war, having merely been suspended during hostilities.

Perhaps one of the most recent and striking examples of a determination of this question was *the insistence of the United States Government that treaties were not abro-*

gated by war, when this question arose after the war with Spain.

In 1899 the United States Government demanded that Spain carry out the terms of the Treaty of Madrid, of February 17, 1834, regarding payment of certain annual indemnities and claims of American citizens. Spain replied that the War of 1898 with the United States had terminated this old treaty. The United States Government answered that they refused to admit any such contentions, *because Spain's obligation under the treaty was made permanent* and the United States Department of State informed Spain that the Treaty of 1834, *being perpetual* in its nature, was not terminated or affected by the War of 1898, and as a result all the payments were made by Spain under the treaty as demanded. Here is an instance where, by Article 29 of the Treaty of Madrid, of July 3rd, 1902, made after the war with Spain, and after the Treaty of Paris of 1898 was signed, in which no provision was made regarding existing treaties, it is declared that all treaties, agreements, contracts and conventions between the United States and Spain, prior to the Treaty of Paris of 1898, should be "expressly abrogated and annulled," with the exception of the 1834 Treaty. And in this instance treaties existing prior to a war were terminated by a new treaty over three years after the treaty of peace was signed at Paris in 1898. See Prof. George G. Wilson of Harvard University, International Law, 1927 Ed. 208 and 430; Hyde, International Law, Vol. 2, page 92; Moore, International Law, pages 377, 378, 379.

Bearing directly on this aspect of the case for the respondents, we wish to cite what is said by Professor George G. Wilson of Harvard University in his book on Interna-

tional Law, 197, Second Edition, 430, where he states therein:

> "Some treaties may revive *ipso facto* on conclusion of the Treaty of Peace."

The general principle was stated in 1823 by the United States Supreme Court, in the New Haven case, *ante*.

Chancellor Kent, as has been quoted, cites the case of Sutton v. Sutton, *ante*, and it will be observed that the New Haven case and the case of Sutton v. Sutton are given by all the leading authorities in the field of International Law as authority for the propositions for which we contend.

For references see:

Crandall on Treaties, 1904 Ed., page 242;

Chancellor Kent Commentaries on International Law (Abdys Edition), page 394;

Professor James Brown Scott Leading Cases on International Law, 1st Edition, pages 427, 428; Sec. Edition, pages 93 and 468;

Charles C. Hyde International Law as applied and interpreted by the United States (1922);

Charles G. Fenwick Principles of International Law (1924), pages 444-468;

Evans Leading Cases on International Law (1917), pages 235, 240; (1922), page 398;

Pitt-Cobbett International Law, 4th Ed., Vol. 2, page 44;

Norman Bentwich Leading Cases International Law, (1913), at page 150.

We also refer to Edwin Moxey International Law, 1906, page 189, and Pasquale Fiore International Law Qualified,

1918, page 719, and Hannis Taylor International Business Law, 1901, page 604, citing Lawrence Principles of International Law, page 313, all of which take the position that such treaties are only suspended.

While these are the opinions of legal authorities, the leading American adjudication on the principle involved, as well as on the Treaty forming the basis of this appeal, is found in the New Haven case, *ante*, where the Supreme Court **expressly repudiates the doctrine contended for by the petitioners herein**. We feel, therefore, that we have sustained the burden of the argument on this point.

THE JAY TREATY OF 1794 WAS RECOGNIZED AS BINDING AND HELD TO BE IN FORCE AND DECISIVE OF THE QUESTIONS RAISED IN THE FOLLOWING CASES, AT THE TIMES AND DATES STATED, AFTER 1794 AND 1812.

Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185; 2 Curtis U. S. 65, 69, *(1808)*:

"Condemnation of a neutral vessel for the intent to enter a blockaded port—considered in 1808 under provisions of the Treaty of 1794 by Chief Justice Marshall."

Fairfax v. Hunter, 7 Cranch, 603, 627; 2 Curtis U. S. 684, 691, 692, *(1813)*:

"Ejectment action involving those claiming rights under the Treaty of 1794."
Judge Story:

"For we are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax."

Jackson v. Clark, 3 Wheaton, 1; 4 Curtis Decisions, U. S. 153, *(1818)*:

"C. J. Marshall held that under Art. 9 of the Treaty of 1794 between the United States and Great Britain, British subjects, etc., may continue to hold land, etc. Defendant continued to be a British subject and he is entitled to hold and devise the land in question under that Treaty."

Craig v. Bradford, 3 Wheaton, 594; 4 Curtis U. S. 305, 308, *(1818)*:

"Judge Washington held that a defensible title, etc., is completely protected and confirmed by the 9th Article of the Treaty of 1794, between the United States and Great Britain."
(Confirms *Fairfax v. Hunter* case.)

Orr v. Hodgson, 4 Wheaton, 453, 464; 4 Curtis U. S. 442, 443, 445, *(1819)*:

"Discusses the question—Who are heirs—under the 9th Article of the Treaty of 1794."

Story, J., referring to the Treaty of 1794, said:

"By the express terms of the treaty, it might lawfully pass to her heirs."

Shanks v. Dupont, 3 Peters, 242, 250; 8 Curtis Decisions of Supreme Court of U. S., 395, 400, *(1830)*:

"A woman, a citizen of Charleston, S. C., who married a British officer with whom she went to England in 1782 and remained there till her death in 1801—is a British subject within the purview of the 9th Article of the Treaty of 1794 with Great Britain."

Story, J.:

"The question arises whether she and her heirs are not within the purview of the 9th Article of the Treaty with Great Britain of 1794. It appears to us that they plainly are."

"Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is

therefore, within the words of the Treaty. Why ought she not also to be held within the spirit and intent?"

"If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?"

"It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794."

Blight's Lessee v. Rochester, 7 Wheat, 535; 5 Curtis Decisions of Supreme Court of U. S., 316, 319, *(1822)*:

"The treaties of 1783 and 1794 only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired, etc."

The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wm. Wheeler, 8 Wheaton, 464, *(1823)*:

"Under the Treaty of 1783, the property of such corporation as plaintiff is protected the same as that of an individual and title thus protected is confirmed under the Treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceedings, for the defect of alienage."

In the following case, the 2nd and 9th Articles of the Jay Treaty, 1794, were discussed and declared to be binding. *Forsyth v. Reynolds*, 15 Howard, 358, 20 Curtis Decisions U. S. 561, *(1853)*:

"Lands granted by the Act of March 3rd, 1807, in fulfilment of the 2nd Article of the Treaty of 1794, between the United States and Great Britain, were not donations, and did not disqualify a settler from receiving a donation under the Act of May 15th, 1820, and of March 3rd, 1823."

Harden v. Fisher, 1 Wheaton 300, 302; 5 Curtis Decisions of Supreme Court of U. S., 560, 561, *(1816)*:

(C. J. Marshall): "What British subjects holding lands in the United States must show under the Treaty of 1794, Article nine, so as not to be considered as aliens in regard to lands held by them in the United States."

Hughes v. Edwards, 9 Wheaton, 489, 496; 6 Curtis Decisions of Supreme Court of U. S., 146, 150, *(1824)*:

The title of alien mortgages is protected by the treaty of 1794, etc.

(Approves Harden v. Fisher, and *Orr v. Hodgson.)*

Judge Washington said:

"This objection would not, we think, avail the appellants, since the remedies, as well as the rights of these aliens, are completely protected by the treaty of 1794."

Denn ex. Dem. Fisher v. Harden, 1 Paine Circuit Court 55, Rep. of United States *(1812)*:

Reversed on appeal in 1 Wheaton Rep. 300; 5 Curtis Decisions Supreme Court 560 *(1816)*—where court found that plaintiff held title to the land in question at date of treaty of 1794.

(See same case above under *Harden v. Fisher.)*

Jackson ex. Dem. v. Augustus Porter, 1 Paine Circuit Court Reports of United States, 457, *(1825)*:

This case discusses boundaries of a post under *Article 2* of the Jay Treaty of 1794.

The Court said:

"Articles 2 and 9 of the 1794 Treaty were meant to protect legal and equitable interests in land and not trespassers and intruders without rights."

Judge Thompson, at pages 481, 482, 483, referring to the Jay Treaty of 1794, said:

> "The 2nd and 9th Articles have been referred to. The Treaty applies to the title whatever it is, and gives it the same legal validity as if the parties were citizens."

The Society for the Propagation of Gospel, etc., v. Wheeler, et al., 2 Gallison Circuit Court Reports of United States, 105, Fall Circuit Court of United States, New Hampshire, Oct. Term, *(1814)*, at Exeter:

Part of this decision falls under the Jay Treaty of 1794. Speaking of Article 9, Judge Story at page 135 says:

> "This article has never been annulled, and therefore remains in full force. It deserves and ought to receive a liberal construction."

See Judge Story at page 127, lines 6 on, where he refers to Article 9 of Treaty as overruling defendant's argument that the Gospel Corp. can not sue on account of alienage.

In the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 304, 360, 368, 370; 3 Curtis Decisions of Supreme Court of U. S., 584, 588, 590 *(1816)*, Judges Story and Johnson refer to the Treaty of 1794 as being then in existence and of binding force, Mr. Justice Johnson holding, at page 370, that:

> **"THE TREATY OF 1794 HAD BECOME THE SUPREME LAW OF THE LAND * * * THE MAJORITY OF THE COURT DETERMINED THAT, AS A PUBLIC LAW THE TREATY WAS A PART OF THE LAW OF EVERY CASE DEPENDING IN THIS COURT."**

Private Correspondence.

Private correspondence concerning a treaty subsequent or prior to its negotiation is always of weight in determining the purpose of the treaty itself. The question whether a treaty is terminated in whole or part by war between the contracting parties has been the subject of much discussion.

The correspondence originally contained in the respondents' brief in answer to the petition for writ of certiorari herein, between John Quincy Adams, American Minister to Great Britain, and the British Foreign Minister, Lord Bathurst, in the year 1815 and 1816, has now been largely quoted in the petitioners' brief at pages 39 and 40.

We originally quoted this correspondence to indicate to the Court what a decided position the Government of the United States took to uphold the proposition that the permanent provisions of a treaty were not abrogated by war.

The petitioners herein apparently cite this correspondence for the purpose of showing the legal position taken by Lord Bathurst some 115 years ago.

Would the Government urge this Court to adopt what has always been maintained by this Government as an erroneous interpretation of the Rules of International Law, because probably for selfish reasons at that time Lord Bathurst insisted that certain provisions of the treaties were abrogated by war and not revived without specific recognition in a subsequent treaty?

We urge upon this Court that the more liberal spirit of interpretation should be the one to be adopted by this Court. The principles of interpretation, it seems to us, which should be applied specifically to the Jay Treaty of 1794, were enunciated in clear and unambiguous language of this Court through Mr. Justice Story, in the case of *Shanks v. Dupont*, 3 Peters, 242 and 250, (1830), where it said:

> *"It seems to us, then, that all British born subjects ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794."*
>
> *"If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further and the other exclude private rights, why should not the most liberal exposition be adopted?"*

As Mr. Justice Brown stated in the case of *Tucker v. Alexandroff*, 183 U. S., 424:

> "As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, *but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit* which is calculated to make for the existence of a perpetual amity so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

Mr. Justice Brown, at page 437, also said:

> "The treaty should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose."

In the case of *Sullivan v. Kidd*, 254 U. S., 433, and *Missouri v. Holland*, 252 U. S., 416, the Supreme Court said:

"Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals and are to be executed in the utmost good faith, with a view of making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole."

It is a well-settled rule, as determined by this Court in the case of *Hauenstein v. Lynham*, (1879), 100 U. S. Rep. 487, that:

> *"Where a treaty admits of two constructions, one restricted as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred."*

See also *Adams v. Akerlund*, 168 Ill. 632; 48 N. E. 454; *Marryatt v. Wilson*, 1 Bosanquet & Puller Rep., 435-436; *Geofroy v. Riggs*, 133 U. S., 258, 271; *in re Ross & McIntyre*, 140 U. S. Rep., 453, 475. Finally, we cite *United States v. Ferris, et al.*, and *Lane v. Stone*, 19 Fed. (2nd), 925, where Judge Bourquin wrote as follows:

> **"A decent respect for the opinion of mankind, national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by Treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that Treaties shall not be reduced to mere 'scraps of paper.'"**

The Jay Treaty was not Abrogated—but was Recognized by Both Governments as Late as 1842.

The Solicitor-General, referring to the Jay Treaty of 1794, states at the bottom of page 2, and at the beginning of page 3 of the petition for rehearing, that:

"In view of the fact that mutual rights were granted by Article III to British subjects and Amer-

> ican citizens, as well as to Indians dwelling on either side of the border, it reasonably might appear that any question regarding whether the treaty is in force and effect is a political and not a judicial one, * * * *"

and again on page 11 of the petition for rehearing, in referring to the same matter as above mentioned, he stated in the second paragraph on this page:

> "Furthermore, if the Circuit Court of Appeals is correct in holding that these aliens are admissible under the statutory exception relating to aliens coming to the United States temporarily for business, the Court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government."

We respectfully submit that the political branch of the Government *has already passed* upon this question and decided that the Jay Treaty is in full force and effect. Under date of March 17th, 1919, the Hon. William Phillips, then Acting Secretary of State of the United States, transmitted to the Senate a letter in response to a resolution passed by the Senate directing the Secretary of State to furnish the Senate with complete information concerning, "The countries with which the United States has Treaties which prevent us from giving preference to Americans or American ships in the carrying of imports or exports, and what is necessary to be done to abrogate such Treaties, and what, if any, steps our Government has taken to secure the abrogation of the same." From his letter we quote:

> "The Acting Secretary of State transmits to the Senate herewith a memorandum prepared in the Department of State in response to the resolution quoted above. It is hoped that this memorandum will contain the information desired by the Senate."

The Jay Treaty of 1794 is then copied in full and appears in Volume 14, pages 5, 18 and 19 of the Senate Documents

of the 66th Congress of the United States, first session 1919. The then Acting Secretary of State then states with regard to the Jay Treaty of 1794 and Article III thereof:

> *"The Treaty from which the above quoted Article is taken contains no provision for abrogation; hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation."*

The resolution above referred to, and the letter and other documents quoted from the Acting Secretary of State, seem to show that the political department of the Government has already determined that the Jay Treaty of 1794 is still in full force and effect.

In order to further show and prove our contention to be right, and that the Jay Treaty of 1794 is still in effect and exists as a living force, and that it is a most important document for both nations and their interests, we ask the Court to consider for a moment Article number 5 of the Jay Treaty, which says:

> "Whereas doubts have arisen what river was truly intended under the name of the St. Croix River, mentioned in the said Treaty of Peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, etc., etc., etc."

By this 5th clause or article of the Jay Treaty of 1794, which Article it will be remembered is one of the ten (10) permanent clauses of that Treaty, provision is made for the appointment of three commissioners to determine the St. Croix River, and in accordance with these provisions of the said 5th Article the Commissioners met at Halifax, in the Province of Nova Scotia, Canada, in March, 1798, and

determined the River St. Croix, but left unsettled the place of its source; this was left in dispute until the year 1842.

(See "American Diplomacy, Treaties and Topics," at page 73 (1894); being a treatise by the late Professor Freeman Snow, formerly head of the Department of International Law and Diplomacy at Harvard University.)

Now, in the year 1842 a Treaty was entered into between Great Britain and the United States for the purpose among other things of settling and accurately defining the boundaries between the possessions of Great Britain in North America and the Territories of the United States.

This Treaty was concluded on August 9th, 1842, and proclaimed November 10th, 1842, and is known as the Webster-Ashburton Treaty.

By Article one (1) of that Treaty of 1842, the Treaty of Peace of 1783, and the Jay Treaty of 1794, are all treated as interdependent upon each other, and referred to and dealt with as valid and subsisting documents and still in full force and effect, and regarded as governing the final settlement, fixing, determination and location of the true boundary lines of the possessions of the nations referred to in North America, and as to the exact location of the said River St. Croix and the true place of its source.

In connection with the said boundaries and the St. Croix River, Article one (1) of the said 1842 Treaty declares, among other things, that:

> "It is hereby agreed and declared that the line of boundary shall be as follows: Beginning at the monument at the source of the River St. Croix as designated and agreed to by the commissioners under the fifth

(5th) Article of the Treaty of 1794, between the Governments of the United States and Great Britain, etc., etc., etc."

Article one (1) of the 1842 Treaty also refers to, incorporates and uses the Jay Treaty of 1794 as one of the vital documents in a chain of evidence necessary to properly and accurately fix, locate, determine, and settle certain portions of the whole boundary line between the United State of America and the British Dominions and possessions in North America, under and by virtue of the Treaty of Peace of 1783 to which the Jay Treaty of 1794 and the Webster-Ashburton Treaty of 1842 refer, as will be seen by reference to the said Treaty Articles, and to the provisions of the said Treaty of 1842, Clause (1).

This shows conclusively that the Treaty of Peace of 1783, and the Jay Treaty of 1794, are necessary and vital parts of the later Webster-Ashburton Treaty of 1842, in order to complete the boundary lines and determine the rights of each nation, and in regard to the said River St. Croix, and both Treaties therefore become embodied into and are treated and made living parts of the later 1842 Treaty, both by reference thereto and incorporation therein.

This seems a strong indication of recognition of the permanency of the Jay Treaty of 1794 by both nations in 1842.

(For authorities and Treaties on this matter, see the Volume of Treaties and Conventions between the United States and other powers, 1776 to 1887, Washington Government Printing Office, 1889, page 433, and also see, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers,

1776 to 1909," by William M. Malloy, Volume one (1), pages 650 and 651 for 1842 Treaty, and references therein to the Treaty of Peace of 1783 and to the Jay Treaty of 1794; and see Snow, "American Diplomacy—Treaties and Topics," pages 82 and 83, for summary of the 1842 Treaty.)

From the foregoing, we believe that we are right in our contention that the Jay Treaty, in so far as its features were made permanent, by its own terms and provisions is still in full force and effect.

The Supplemental Agreement of 1796 is Also Permanent.

The Supplemental Agreement of 1796 reads as follows:

"1796."

"EXPLANATORY ARTICLE TO THE THIRD ARTICLE OF NOVEMBER 19, 1794, RESPECTING THE LIBERTY TO PASS AND REPASS THE BORDERS AND TO CARRY ON TRADE AND COMMERCE.

"*Concluded May 4, 1796; Ratification advised by Senate May 9, 1796.*

"Whereas by the third article of the treaty of amity, commerce and navigation, concluded at London on the nineteenth day of November, one thousand seven hundred and ninety-four, between His Britannic Majesty and the United States of America, **it was agreed that it should at all times be free** to His Majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of the boundary line assigned by the treaty of peace to the United States, *freely to pass and repass*, by land or inland navigation, into the respective territories and countries of the two contracting parties, on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other, subject to the provisions and limitations contained in the said article;

"And whereas by the eighth article of the treaty of peace and friendship concluded at Greenville on the third day of August, one thousand seven hundred and ninety-five, between the United States and the nations or tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimies, Miamis, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias, *it was stipulated that no person should be permitted to reside at any of the towns or the hunting camps of the said Indian tribes*, as a trader, who is not furnished with a license for that purpose under the authority of the United States; **which latter stipulation has excited doubts, whether in its operation it may not interfere with the due execution of the third article of the treaty of amity,** commerce and navigation; And it being the sincere desire of His Brittanic Majesty and of the United States that this point should be so explained as to remove all doubts and promote mutual satisfaction and friendship; And for this purpose His Brittanic Majesty having named for his Commissioner, Phineas Bond, Esquire, His Majesty's consul-General for the Middle and Southern States of America, (and now His Majesty's Charge d'Affaires to the United States,) and the President of the United States having named for their Commissioner, Timothy Pickering, Esquire, Secretary of State of the United States, to whom, agreeably to the laws of the United States, he has intrusted this negotiation: They, the said Commissioners, having communicated to each other their full powers, have, in virtue of the same, and conformably to the spirit of the last article of the said treaty of amity, commerce and navigation, entered into this explanatory article, *and do by these presents explicitly agree and declare, that no stipulations in any treaty subsequently concluded by either of the contracting parties with any other State or nation, or with any Indian tribe, can be understood to derogate in any manner from the* RIGHTS *of* FREE INTERCOURSE AND COMMERCE, *secured by the aforesaid* THIRD ARTICLE *of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said per-*

sons shall remain at full liberty FREELY TO PASS AND REPASS, by LAND OR INLAND NAVIGATION, INTO THE RESPECTIVE TERRITORIES AND COUNTRIES OF THE CONTRACTING PARTIES, *on either side of the said boundary line, and freely* to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

"This explanatory article, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and made a part of the said treaty of amity, commerce and navigation, **and shall be permanently binding upon His Majesty and the United States.**

"IN WITNESS WHEREOF, We, the said Commissioners of His Majesty the King of Great Britain and the United States of America, have signed this present explanatory article, and thereto affixed our seals.

"Done at Philadelphia this fourth day of May, in the year of our Lord one thousand seven hundred and ninety-six.

(SEAL) P. BOND.
(SEAL) TIMOTHY PICKERING."

This additional and further International Agreement, entered into in the year 1796, is to be found in Vol. I, pages 607-609, of Malloy's Treaties and Conventions.

It is respectfully submitted that Article III of the Jay Treaty of 1794 and this Explanatory Article of 1796 cover, include and embrace three outstanding, separate and distinct subjects of agreement and international contract:

First, there is what is known as "*amity*," or friendship shown by giving British subjects and United States citizens the right freely to pass and repass, to come and go, cross and recross from one country to another freely without hindrance by or from the officials of either country;

Second, there is the right of *navigation;* the right to go freely into the waters of each country, as therein set forth;

Thirdly, there is the right freely to carry on *trade and commerce* with each other.

In fact, the very title of the Treaty of 1794 is that of amity, commerce and navigation.

The plain intent and purpose and the proper interpretation of the Third Article of the 1794 Treaty and of the 1796 "Explanatory Article" is to grant amicable intercourse among the people of each country on either side of the International Boundary. It gives a general freedom of business and social intercourse and freedom of navigation for the people of both countries.

The right to freely carry on trade and commerce is another right which is also given to the people of each country, and, in addition, the right of free navigation is once more affirmed in this 1796 "Explanatory Article," as it is called.

It is further submitted, that the reasons given in the early part of the foregoing new agreement or "Explanatory Article" of 1796, as justification for its negotiation and signature by the United States and Great Britain, support the contentions of the respondents herein beyond any further controversy, and it plainly states that it is entered into to remove any doubt which may exist as to the rights of the people of each country to cross and recross the border.

We would also particularly draw the attention of the Court to the fact that the last paragraph of this 1796 Agreement between the United States and Great Britain makes the 1794 and this 1796 Treaty and Agreement, by express words, "permanently binding upon His Majesty and the United States."

Abrogation Has Been Sought by Neither Party to the Treaty.

It would seem further that International Law and Practice require that the United States Government must first ask for the abrogation of the Jay Treaty before it can legally enforce the border regulations of Order 86 against British subjects in Canada, who desire to exercise their rights under the treaty, which are, both in United States and Great Britain held to be still in force. More especially is this true where these rights and privileges have been exercised under that treaty for upwards of 133 years, since 1794, without objection, and acquiesced in during all that period of time by the United States authorities.

On page 42 of his brief, the Solicitor General seems to attempt to avoid the effect of the letter of *March 27, 1919*, by the Acting Secretary of State, in advising the Senate that the Jay Treaty could not be considered to be abrogated, and has not been abrogated by consent of either government, by stating "The suggestion thus made seems to be contrary to the weight of opinion."

In view of the claims made on pages 2 and 11 of the petition for rehearing in this case that constructions of such matters should be left to the political branch of the government, it seems to us that the following expressions

are pertinent and sustain the previous opinion of the acting Secretary of State.

It is respectfully submitted that under such circumstances it will require the most clear and expressed words of abrogation, and the consent of both nations before it can be considered as abrogated, cancelled or annulled. We feel sure that the Court would welcome the statements of distinguished jurists on this question, and we, therefore, take the liberty of quoting from Honorable Shelby M. Cullom, a well-known United States jurist, and authority on International Law. He says:

> "It is true that the Supreme Court has held that an act of Congress may repeal a treaty, but such repeal would only be effective so far as our domestic law is concerned. The other nation would still have a right to consider us bound by our contract, and if the contract was broken on our part, it might lead to a declaration of war."—North American Review, Volume 180, No. 2, pages 335, 345.

Again, Mr. Bryce, the British Ambassador at Washington, in a communication to Mr. Knox, Secretary of State, on February 27th, 1913, stated in relation to the Act of Congress of August 24th, 1912, and the effect thereof upon the Hay-Pauncefote Treaty, as set out in Senate document No. 4741, 63rd Congress, 2nd Sess. 101:

> "His Majesty's Government conceive that International Law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those same rights in a concrete instance has been taken, which, in the present instance would, according to your argument, seem to mean, until tolls have been actually

levied upon British vessels owned by citizens of the United States have been exempted."

Mr. Wu, the Chinese Minister, wrote to Mr. John Hay, the Secretary of State, on January 25th, 1899, as set forth in the Foreign Relations of the United States documents for 1899 at page 195, as follows:

"However much the courts may feel bound to follow the legislation of Congress, I apprehend you will not contend that adverse legislation or the judgment of a domestic tribunal can release a government from its solemn treaty obligations."

Again on this subject, the Marquis of Salisbury addressed a communication to Mr. Welsh, on November 7th, 1878, as set out in Foreign Relations of the United States, 1878, at page 323; as also did Mr. Chang Yen Hoon, Chinese Minister to Mr. Blaine, Secretary of State, July 8th, 1889, Foreign Relations for 1889, at pages 132 and 133; and also Mr. Caleb Cushing, Minister to Spain, wrote to Mr. Fish, Secretary of State, on January 13th, 1877, Foreign Relations for 1877, page 492, where it is stated that:

"The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States."

And Mr. Fish, Secretary of State, sent a despatch to the United States Minister in China, in 1869, wherein he said:

"You will make clear to the government to which you are accredited the settled purpose of the President to observe with fidelity all treaty obligations of the United States."

(Foreign Relations of the United States, 1870, at page 303.)

These quotations have been submitted to the Court only on the larger aspect of the question. Of course, we insist in this case that there has not been any intent demonstrated by an act of Congress to abrogate the treaty, but that it is General Order 86 which violates the treaty.

The express provisions of the Jay Treaty must be looked at, and treaty provisions must be construed as to best conform to accepted principles of international law, and not in derogation of them. See *Villas v. Marilla* (1911), 220 U. S. 345, at pages 358 to 395.

The treaty is an entire contract, all its articles and provisions are dependent on each other, and have the force of conditions. Each clause of a treaty has the force of a condition.

The violation of any one article of a treaty, is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other; and a violation of any single article overthrows the whole treaty. Kent's Commentaries on International Law, (Abdy Edition) 392; Foulke International Law, (Philadelphia, 1920), Vol. 1, 444.

It is a general principle of construction with respect to treaties that they shall be *liberally construed* so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. See Mr. Justice Field's remarks in *Geofroy v. Riggs*, 133 U. S. 258, at page 271, and in *re Ross*, 140 U. S. 453, at page 475.

The Supreme Court of the United States is reluctant to construe an act of Congress as in violation of an existing treaty, and further than this there can be imputed to Con-

gress no disposition or readiness to disregard the terms of the international agreements of the United States. See:

Ex parte Webb, 225, 663, at page 683;
U. S. v. Mrs. Gue Lim, 176 U. S. 459;
Chem Heong v. U. S., 112 U. S. 536, at page 539;
Lem Moon Sing v. U. S., 158 U. S., at page 538.

In re Chin A. On, 18 Fed. 506, 9 Sawy, 343, the Court said:

> "Before the courts will impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the statute must admit of no other reasonable construction."

In this connection we call to the Court's attention the case *in re Hermann Thomas*, 12 Blatchford, Circuit Court Reports, page 370, referred to also in *Terlinden v. Ames*, 184 U. S. Rep. 270, (1902), where the Court said:

> "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, *without the consent of the United States*."

It is also worthy of note that the preamble to the Covenant of the League of Nations gives it as one of the League's objects:

> "To achieve international peace and security by a scrupulous respect for all treaty obligations."

Even the Immigration Act itself contains numerous references to treaty obligations. For instance, Section 28 of the Act of 1924 (8 U. S. C. A. 224) subdivision "f," defines:

> **"The term 'immigration laws' includes this chapter and all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens;"**

In the case of *Terlinden v. Ames*, 184 U. S. Rep. 270, decided in February, 1902, the late Chief Justice Fuller said:

> "But where sovereignty and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance."

In this case the decision *in re Hermann Thomas, (supra)*, is cited with approval, and the principles there laid down approved.

What the Jay Treaty of 1794 and explanatory article of 1796 mean both to the citizens of the United States and of Canada.

The Jay Treaty is what might be termed for the United States and Canada a charter of rights giving to British Subjects in Canada the right of entry into the United States at all times, and to the citizens of the United States the same right to enter Canada. This going to and fro and crossing and recrossing by the subjects and citizens of both countries under Clause III of that Treaty **is at all times to be free, without hindrance to the citizens of either country and is unlimited as to time and place of passage.**

It was intended to be a kind of freedom of mutual and national intercourse for the subjects and citizens of both countries. **It is not a matter of immigration at all.**

It is respectfully submitted that in view of the authorities herein cited to the Court and in view of the express language of the Treaty itself with regard to the permanency of Article III, that the real purpose of the negoti-

ators of the Jay Treaty of 1794 was, that the border crossing privilege should be a permanent right of both peoples.

A most striking indication of that intention is shown in "Jay's Treaty, A study in Commerce and Diplomacy," (Bemis). Appendix 3 to that book consists of an analytical comparison of Jay's original draft and the Treaty as finally drawn. On page 288, it is shown that the passage and repassage provision, was originally contained in the second paragraph of the draft, and the crossing rights for British subjects and citizens of the United States was contained in the ninth paragraph. The permanency of the Treaty articles in the draft was restricted to the first eight articles of the draft. The footnote (11) on page 288, points this out, saying verbatim:

> "This provision occurs in Article IX of the Jay draft and thus would have been limited to twelve years. Inclusion within Article III made it permanent in the Treaty."

The Convention of 1815.

A short reference to the above Convention will help to further explain the Jay Treaty of 1794, and the additional "Explanatory Article" of 1796.

On July 3rd, 1815, a new Convention, or Treaty Agreement, to regulate commerce and navigation between Great Britain and the United States was concluded and signed, and ratifications were exchanged at Washington on December 22nd, 1815.

This agreement was to last for four (4) years, but it was extended for ten (10) years by the Treaty of October 20th, 1818, and further indefinitely extended by a Conven-

tion of August 6th, 1827, subject to twelve months' notice of abrogation.

Regarding the present position of this Treaty-Convention, showing it to be still in force and effect, Senator Elihu Root, formerly United States Secretary of State, in his argument before the Permanent Court at The Hague in 1910, on the Fisheries Arbitration, referred to this 1815 Convention, incidentally, as follows:

> "The kind of right which was granted in the treaty of 1815, that treaty which was continued by the treaty of 1818, and which, I may observe, was again continued in 1827, and is the treaty under which we live today, to travel and reside."

The above Convention of 1815 will be found on pages 624 to 627 of Malloy's Treaties, Conventions, &c., Vol. 1, (1909), and also in a work by the late Professor Freeman Snow, of Harvard University, entitled: "Treaties and Topics in American Diplomacy," Boston, (1894), at page 76.

It will be remembered that all the articles of the Jay Treaty of 1794, except the first ten, expired by the time limitation stated in the treaty, and by the year 1807 all the articles, from number eleven inclusive to twenty-seven (27), had lapsed in accordance with the provision of article numbered 28 regarding this matter.

This Treaty-Convention of 1815 gives the people and inhabitants of His Majesty's territories in Europe full liberty and freedom to come, with their ships and cargoes, to all the United States territories in America, and permits them to reside there indefinitely, and to build houses for themselves, a similar privilege was given United States citizens.

By this Convention a number of the important articles of the Jay Treaty of 1794, which had expired under the time limitation of Section 28 of that Treaty, were revived and their essential parts again brought into force.

There was no necessity, however, to deal with the first ten (10) articles of the Jay Treaty, because they had already been made permanent and, so far as Canada was concerned, article three (3) of the Jay Treaty gave that country what was now being given to Great Britain and the United States under this new 1815 Convention, and which was previously enjoyed under the old expired clauses of the 1794 Treaty. For instance, Article one (1), and (2), of the 1815 new treaty-convention can be compared with, and are similar to, clauses (14) and (15) of the 1794 treaty.

Article (3) is similar to clause (13) of the 1794 treaty, article (4), referring to Consuls, compares with clause 16 of the 1794 treaty. But the most important article of this 1815 Convention for our argument is the last clause of article two (2) which, we contend, also preserves all our rights under article three (3) of the Jay Treaty of 1794, and the "Explanatory Article of 1796." The last clause of article number two (2), of the 1815 Convention, reads as follows:

> "*The intercourse between the United States and His Britannic Majesty's possessions* in the West Indies, and *on the Continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse.*"

POINT III.

Petitioners' brief contains statements which must be refuted here.

Contesting Petitioners' Brief Concerning Treaty Provisions.

The petitioners' brief takes up at some length the recent decision of the Circuit Court of Appeals in the case of *United States ex rel. Diabo v. McCandless*, 25 Fed. 2nd, page 71, and argues with some weight that this decision did not directly hold Article III of the Jay Treaty to be in effect. The Court did state, however, in the latter part of its opinion:

> "So far as we are advised, neither Great Britain nor the Dominion of Canada have denied to Indians of the Six Nations resident in the United States passage across the boundary line, and if the Jay Treaty is in force, as we find it to be, good faith and the observance of the Treaty calls for the same course of conduct by the United States."

In this connection, the petitioners' brief states on page 10, in discussing the facts of the case:

> "It is not important whether he was or was not naturalized (referring to Danelon), as only native born and not naturalized Canadians are exempt from the quota."

It seems that this is incorrect, because, if Danelon is a naturalized British Subject, he is granted the crossing privilege under the Jay Treaty, assuming it not to have been abrogated.

We further contend that the petitioners' brief is in error when it states, on page 41:

> "At this time the Canadian Immigration Officials will not permit American workmen to cross into Canada to labor or to seek employment."

We attach as an appendix hereto the Order of the Privy Council, passed on Jan. 31st, 1923, providing, in effect, that any citizen of the United States may enter Canada, provided he has sufficient means to maintain himself while seeking employment, if that is his purpose. This we believe to be most important as bearing on the statement of counsel that there seems to be no evidence that Canada has allowed Americans to enter Canada pursuant to the terms of the Jay Treaty. Is not the inference now to the contrary and that, bearing in mind the provisions of the Jay Treaty, Americans were specifically excepted by the Order of the Privy Council of January, 1923, still in effect? It seems to us that this is a substantial compliance with the provisions of the Treaty.

The petitioners' brief states that the Jay Treaty is brought into the case to make it appear that the Immigration Act, given the construction for which we contend, would violate the Treaty and repeal it, and further state that the Treaty is thus used to influence the construction of the statute so as to prevent an alleged conflict.

It does not seem to us that the Jay Treaty could be used to influence the construction of Section 203 for the reason that, if the two were inconsistent with each other, the relators herein would, notwithstanding their Treaty rights, be deprived of entry because the latter Act of Congress would take from them any power to urge their Treaty rights. This, in itself, answers the next statement of counsel to the effect that "any construction of the statute brought about as a result of the Treaty provisions will settle the meaning of the statute not only as to British Subjects, but as to all aliens, because what is a temporary visit for business for one alien is the same for all."

What we do contend for, and what we strongly urge, in accordance with the opinion of the Court below is that GENERAL ORDER 86 IS IMPROPER, and cannot be availed of to deprive the respondents herein from entering the United States, because THIS ORDER is illegal and void:

(1) because inconsistent with Sec. 3 (2) of the Immigration Act of 1924 (now Sec. 203, 8 U. S. C. A.)

(2) because interfering with a treaty right of the respondents.

It is contended by the learned counsel for the petitioners that only Article IX of the Jay Treaty was held in effect after the War of 1812. On the other hand, the learned counsel, in his main argument, attempts to show that treaties are absolutely abrogated by war and not merely suspended. The inconsistency of these two contentions is apparent. This point, we believe we have covered under Point II of the brief.

As bearing on the question of the intent of the two countries that Article III of the Jay Treaty should be permanent, counsel seeks, by making reference to other present laws, to draw the inference that other provisions of Article III have been considered abrogated. For instance, he refers to the provision providing for the freedom from duty on "peltries" brought by land, and again he refers to the rights given thereunder with regard to navigation of the Mississippi River.

The Tariff Acts of 1909 and 1922, which were the only ones easily available to us at the time of writing this brief, provide for no duty on raw furs or raw hides, and, further, so far as has been called to our attention, there is still no restriction to Great Britain to navigate with its boats the Mississippi River if it cared to. It may be that learned counsel has again drawn an incorrect inference.

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Counsel attempts to construe the crossing privilege as a trading privilege, entirely overlooking the fact that the two are **distinctly made separate,** both by the wording of the Treaty and the Supplemental Agreement of 1796.

Lastly, learned counsel refers to the Peace Treaties promulgated after the Great War, in which provisions for the revival of pre-existing treaties and the abrogation of those not revived are specifically made. Does this do more than indicate that the negotiators of the Treaty were seeking beyond any possible doubt to avoid misunderstandings thereafter?

Contesting Petitioners' Brief Concerning the Statute.

On page 16 of the petitioners' brief, the statement is made that General Order 86 was promulgated because aliens began to seek in large numbers to penetrate the border, contrary to the quota restrictions, and that the decision of the Circuit Court, holding that labor is included in a proper definition of business, opens the door to an influx of foreign labor.

In reply to this contention, we can only urge that the quota restriction are placed upon **immigrants only,** and have no reference to temporary visitors.

Again, the brief of the Government states:

> "Prior to the Immigration Act of 1924, the law treated as immigrants those arriving for indefinite or permanent stay, and not those visiting the United States for temporary purposes."

We respectfully submit that there was no necessity prior to the Immigration Act of 1924 to distinguish between

"immigrants" and "non-immigrants", and, therefore, the law then made no provision for "non-immigrants."

On page 50 of petitioners' brief, the claim is made that the origin of Section 3 of the Act of 1924 (Sec. 203, 8 U. S. C. A.) may be found in Section 3 of the Immigration Act of 1917, now Section 136, 8 U. S. C. A., in that part which grants exemption from the barred Asiatic zone to certain people. Apparently the fact is overlooked that the 1917 Act deals with "immigrants" only, not with non-immigrants, and, having barred all immigrants of the Asiatic class and no non-immigrant class having been created by the Act, it became necessary to create certain exceptions. Since that time, it has repeatedly been held that Section 3 of the 1917 Act does not apply to "non-immigrants," *ex rel. Phelps*, 14 Fed. 2nd, 679.

In final answer to petitioners' claim that the Immigration Act of 1924 had always been construed by the Department as preventing the entry of aliens temporarily for labor, we again call the Court's attention to the fact that the promulgation of General Order 86, effective Dec. 1st, 1927, effectively contradicts that statement, for the first word of the General Order is "HEREAFTER," and we call the Court's particular attention to the language of Paragraph III of General Order 86 (page 60 of petitioners' brief), in which reference is made to aliens "whose original admission occurred subsequent to June 30th, 1924."

In connection with the cases of the United States of America on the relation of John Graber v. Karnuth and the equity action of John Graber v. Karnuth, petitioners, attach to and make part of their brief the decision of the

Court below. There is no question that any construction of this Court of the meaning of Section 203, 8 U. S. C. A., will cover that phase of the Graber case also, and, if the relator Graber is entitled to enter as a temporary visitor on business, as held by the Court below, in accordance with its own decision in the case at bar, then the petition for certiorari leaves but one question in both cases, and that question is whether a visa on Graber's passport was a necessity, and, if so, how the refusal of the Consul to visa the passport may be overcome. It is unnecessary for us to discuss this matter at length here because the Court has before it the petition for certiorari in the Graber cases and may refer to them even though at the time of the argument of this case the petition for certiorari may not have reached the Court in due course.

A further point in connection with the Graber case should perhaps be called to the attention of the Court, particularly in view of the brief of the Government on the petition for certiorari herein. The Government contended in its petition for rehearing, referring to the Circuit Court decision in the Cook-Danelon case, as follows:

> "As a consequence of the decision as it now stands it is respectfully pointed out that not only British subjects of the white and black races, but also of the Oriental races, can enter Canada and immediately gain admission to the United States for practically an indefinite period without regard to the immigration laws which forbid the admission as immigrants of persons ineligible for citizenship. In fact, it follows that persons of any nationality must be admitted to the United States under this decision without regard to the immigration laws so soon as they become lawfully domiciled within Canada and thereby become British subjects."

It is presumed that counsel for the Government had in mind the decision of this Court in the *Pizarro case*, 2

Wheaton, 227, which held, in substance therein, in construing the Spanish Treaty of 1795, that the word "subject" should be given the same meaning as the word "people" or "inhabitants". Under this decision, a non-native British subject residing in Canada might be admissible as a British subject. We did not, however, in the Graber case make this claim before the Circuit Court, but called that case and the subsequent apparent narrowing of the Pizarro construction in the cases of *Carlysle v. United States*, 16 Wall, 147, and *Loi Hoa v. Nagle*, 13 Fed. 2nd, 80, 275 U. S. 475, to the Court's attention, and stated that it was a matter worthy of consideration, but urged its consideration *not as entitling the relator therein to enter this country under the Jay Treaty*, but *to enter this country without a passport visa* under the exception in the Executive Order of the President *exempting British subjects domiciled in Canada from the requirement of a visaed passport*. This matter is called to the attention of this Court in Point V of the petitioners' brief on the petition for certiorari in the Graber case.

We venture to suggest that if the question should be presented directly at some future time, the Bureau of Immigration will quickly take the position that the ruling in the *Pizarro* case would not apply to non-native Canadian Britishers, seeking to enter the U. S. under the provisions of Article III of the Jay Treaty.

POINT IV.

General Order 86 being contrary both to the Immigration Act and the Jay Treaty provisions, the aliens were illegally detained. It follows, the judgment below was right, and should be affirmed.

It is respectfully submitted that the judgment below should be affirmed.

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ADDENDUM:

After the completion of the paging of this brief, it was decided to call the attention of the court to two more cases on the question of liberal treaty construction:

Van Bokkelen case, Hyde, Vol. 2, page 67;
The Blonde and Other Ships (1922) Appeal cases, Privy Council of England, 1 App. P. C. 213.

APPENDIX "A".

Canadian Privy Council Regulation.

P. C. 183.

Wednesday, the 31st day of January 1923.

(As amended by P. C. 642 of the 11th day of April 1923.)

His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Immigration and Colonization, is pleased to rescind the Order in Council of the 9th day of May, 1922 (P. C. 717) and the same is hereby rescinded as from and after the 15th February, 1923;

His Excellency the Governor General in Council, under the authority of section 38 of the Immigration Act 9-10 Edward VII, chapter 27, as amended by 9-10 George V, Chapter 25, and having regard to unemployment conditions now existing in Canada, is pleased to make the following regulation, and the same is hereby made and established accordingly:

From and after the 15th February, 1923, and until otherwise ordered, the landing in Canada of immigrants of all classes and occupations, is hereby prohibited, except as hereinafter provided:

The Immigration Officer in Charge may notwithstanding the provision of P. C. 23 of the 7th January, 1914, permit to land in Canada any immigrant who otherwise complies with the provisions of the Immigration Act, if it is shown to his satisfaction that such immigrant is—

(1) A bona fide agriculturist entering Canada to farm and has sufficient means to begin farming in Canada.

(2) A bona fide farm labourer entering Canada to follow that occupation and has reasonable assurance of employment.

(3) A female domestic servant entering Canada to follow that occupation and has reasonable assurance of employment.

(4) The wife or child under 18 years of age, of any person legally admitted to and resident in Canada, who is in a position to receive and care for his dependents.

(5) Any United States citizen entering Canada from the United States who shall satisfy the Immigration Officer in charge at the port of entry that he has sufficient means to maintain himself until employment is secured.

(6) Any British subject entering Canada directly or indirectly from Great Britain or Ireland, Newfoundland, the United States of America, New Zealand, Australia or the Union of South Africa who shall satisfy the Immigration Officer in Charge at the port of entry that he has sufficient means to maintain himself until employment is secured: Provided, that the only persons admissible under the authority of this clause are British subjects by reason of birth or naturalization in Great Britain or Ireland, Newfoundland, New Zealand, Australia or the Union of South Africa.

(7) A person who has satisfied the Minister that his labour or service is required in Canada.

(8) The father or mother, the unmarried son or daughter eighteen years of age or over, the unmarried son or daughter eighteen years of age or over, the unmarried brother or sister, of any person legally admitted to and resident in Canada, who has satisfied the Minister of his willingness and ability to receive and care for such relative;

Provided that this clause shall not apply to the relative of any resident of Canada who himself failed to observe the conditions under which he was admitted to Canada.

And Provided further that the provisions of this Order in Council shall not apply to Immigrants of any Asiatic race.